Supreme Court of the United States.

OCTOBER TERM, 1904.

EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY, and THE AMERICAN BONDING COMPANY, OF BALTIMORE,
APPELLANTS,

vs.

KENNEDY J. HANLEY,
APPELLEE.

No.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLANTS ON MOTION TO DISMISS THE APPEAL.

Under the act creating the Circuit Court of Appeals its decisions are made final in all cases where the jurisdiction of the Circuit Court is dependent *entirely on diverse citizenship*. Appeals may be taken in *all* other cases, of right.

Act of March 3, 1891 (26 Stats. L. 826).
Supplement R. S., p. 901, Section 6.

The jurisdiction of the Circuit Court must at all times be shown on the face of the complaint, and it has been held in such cases, construing the Court of Appeals statute, that if, in addition to the allegation of diverse citizenship, a distinct Federal question appears on the face of the complaint, the right of appeal exists from the Circuit Court of Appeals to the Supreme Court.

Spreckels Sugar Ref. Co. v. McLain, 192 U. S. 397.
Northern Pac. Rwy. Co. v. Soderberg, 188 U. S. 526.
Sugar Refining Co. v. New Orleans, 181 U. S. 281.
Howard v. U. S., 184 U. S. 681.
Col. Central M. Co. v. Turck, 150 U. S. 141.

There was some obscurity on this last point until the recent case of Spreckels Sugar Refining Company v. McLain, *supra,* but all question was removed by that case; and although the decision was by a divided court, it now stands as the law of the court.

The Federal question which will give the Circuit Court jurisdiction in the first instance must be one "arising under the Constitution or laws of the United States."

Sec. 2, Act of August 13, 1888 (25 Stats. p. 303).
Supplement Revised Statutes, p. 612.

It only remains to show that a case is made on the face of the complaint under the Constitution or laws of the United States.

The allegations of the complaint (pp. 1 to 7 of the record) show that complainant having been lawfully vested with title to eight twenty-fourths interest in the Skookum mine by a purchase at administrator's sale, completed by the payment of the purchase price and the receipt of a deed, all ratified and confirmed by the order of the Probate Court, the judge of that court, at a later period and without notice to complainant, made an order setting aside the sale made to complainant, on the ground that the same had been fraudulently obtained, and requiring the administrator to make another deed to the same interest to the Chemung Mining Company, the grantor of the defendants. The allegations further show that the administrator objected to making any further deed on the ground that he had exhausted his power when he made the deed to complainant, and that the defendants caused mandamus proceedings to be commenced in the District Court of Idaho to compel the administrator to make another deed, in which suit they prevailed; and that on an appeal of said mandamus suit to the Supreme Court of Idaho, the latter court affirmed the judgment of the District Court. The complaint alleges that complainant was not only not notified of the proceedings adverse to him in the Probate Court, but he was not served and was not a party in the mandamus suit, either in the District Court or in the Supreme Court. The complaint alleges that the defendants base their right to the property on these proceedings, but that the same were "begun secretly in order

to exclude him from any part therein and prosecuted to that end, without lawful notice to him or any attempt to make him a party in any way whatever. Further, that "*all* of the pretended proceedings of said case were and are absolutely null and void, and the decree of said case is null and the proceedings thereunder void."

The complaint further shows that defendants are in possession of the property mining out its ore, founding their right on the proceedings before set up, giving out and proclaiming that through them they have acquired title to the said interest, and that the action of the Probate Court and of the other courts constitutes an adjudication in their favor.

It would be difficult, we submit, to make a more complete case of the deprivation of property without due process of law.

It is now well settled that the Fourteenth Amendment applies to the action of the courts as well as to the action of the legislative and executive authorities of the states.

We will not cite the innumerable cases in this Court on due process of law, but will confine ourselves to a few of the late cases which show beyond question that the action of the courts of Idaho, as alleged in the complaint, constituted a deprivation of property without due process of law, within the meaning of the Fourteenth Amendment.

In *Noble v. Union River Logging Railroad,* 147 U. S. 175, it was held that when a railroad land grant had once been approved by the Secretary of the Interior,

the title had become vested, and that the order of approval could not be subsequently revoked, because to do so would be to deprive the railroad company of its property without due process of law, and the Secretary was enjoined from proceeding to carry out his order of revocation. The cause of revocation was fraud in procuring the original order of approval, as the cause of revocation stated in the order of the Probate Court in this case was fraud in procuring the sale and the making of the deed to complainant, but this Court held that title had become vested and could not be set aside.

The additional ground is in this case, which was not in the Noble case, that the order of revocation was made without notice to the complainant.

In *Scott v. McNeill,* 154 U. S. 34, the property of a living man had been administered on by the Probate Courts of the State of Washington, in the belief that he was dead. His property had been sold under orders of the Probate Court, deeds made, and the sales regularly confirmed, but, of course, without notice to him. This Court held that the sales were void because made without due process of law, and further, that the decision of the Supreme Court of Washington, with the owner properly before it, holding the sales good, was in itself depriving him of his property without due process of law. The Court said, among other things: "These prohibitions (Fourteenth Amendment) extend to all acts of the state, whether through its legislative, its executive or its judicial authorities." And again, "No judgment of a court is due process of law if rendered without jurisdiction in the court or without notice to the party."

In *Chicago, Burlington, etc., R. R. v. Chicago,* 166 U. S. 226, the Court went a step further and said: "But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive and judicial authorities, and therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, violates that constitutional inhibition; and as he acts in the name of the state, and is clothed with the state power, his act is that of the state." (pp. 233, 234.)

See as further illustrating the principle:

Pennoyer v. Neff, 95 U. S. 714.
Lennard v. Louisiana, 92 U. S. 480.
Hagar v. Reclamation Dist. No. 108, 111 U. S. 708.
U. S. v. Lee, 106 U. S. 220.

Would the jurisdiction of the Circuit Court have been maintained on the allegations of the complaint if there had been no averment of diverse citizenship? Undoubtedly it would, because under the doctrine of the late cases from which we have quoted, the complaint shows a deprivation of property without due process of law; and that, in the language of the statute fixing the jurisdiction of the United States Circuit Courts, makes a case "arising under the Constitution or laws of the United States."

It is quite usual for pleaders in framing bills to refer to laws or constitutional provisions which they claim have been violated, and that feature is absent in this bill, and it may be said, therefore, that it was not the intention of the pleader in this case to invoke the jurisdiction of the Court on constitutional grounds, but there are two answers to such a contention. First: The intention of the pleader is immaterial. If he sets up facts showing a Federal question, that is all that the law requires. Second: While it is not unusual for pleaders to refer to statutes or Constitution, it is not strictly good pleading to do so. The books lay it down that a pleader should confine himself to the facts and leave it to the courts to apply the law. So that no inference can be drawn from the failure of the pleader in this case to invoke, in express terms, the protection of the Federal Constitution. Undoubtedly he could have held the case in court, by virtue of the Federal question stated on the face of the complaint, had the jurisdiction of the Court upon other grounds been defective; and that is the test.

There is a line of cases relating to appeals from the Circuit Court direct to the Supreme Court, under Section 5 of the act of 1891, in which it is held that it must appear on the record that the Federal question was distinctly raised and passed on in the lower court, and in which there must have been affirmative mention of the Constitution, statute or treaty to constitute the raising of such question. We conceive that those cases have no application to appeals from the Circuit Court of Ap-

peals to the Supreme Court. The right of appeal from the Circuit Court of Appeals is given in all cases other than those where the jurisdiction of the Circuit Court depended *entirely* on diverse citizenship, and in determining whether there was another ground of jurisdiction in the Circuit Court than diverse citizenship one must look, not at a bare claim or mention of some statute or constitution, such as would be sufficient to show that a Federal question was raised in the court below under Section 5, and as would show that the action of the Court was actually invoked on that question, but must look at the logical effect of the allegations of the complaint. If those allegations are such as to show jurisdiction in the court below on another ground than diverse citizenship, then the appeal must be allowed, even though the constitution, law or treaty involved be not mentioned.

Chief Justice Waite laid down the rule for ascertaining the sufficiency of the jurisdictional averment in

Gold Washing & Water Co. v. Keyes, 96 U. S. 199.

In that case the petition for removal, which had the same relation to the jurisdiction of the Circuit Court in removal cases that the complaint has in cases of original jurisdiction, set out three statutes of the United States fully, on which petitioner relied, but it did not connect them with the case by apt and proper averments.

Chief Justice Waite said: "The office of pleadings "is to state facts, not conclusions of law. It is the duty "of the Court to declare the conclusions and of the par-"ties to state the premises."

"In pleading the statutes, therefore, the facts must "be stated which call it into operation. The averment "that it is in operation will not be enough, for that is "the precise question the Court is called on to deter- "mine." Again, the jurisdiction must be shown "by a "statement of facts in legal and logical form such as "is required in good pleading."

1 Chitty, Pl., 213.

That no more is necessary in jurisdictional averments is shown by two very recent cases:

Northern Pacific Railway Co. v. Soderberg, 188 U. S. 526, and
Warner v. Searle & Herath Co., 191 U. S. 195.

In neither of these cases was the statute specifically set up or any claim or right under it made, but in both this Court ruled that there was a distinct ground of jurisdiction stated other than that of diverse citizenship. In the latter of the two cases it appeared that it was intended to rely on the allegation of diverse citizenship and to make a case only of common law infringement of a trademark, but since the allegations, although informal and imperfect, were sufficient to show infringement of a registered trademark under the act of Congress, the Court held that the case was one in which the jurisdiction of the Circuit Court did not depend entirely on diverse citizenship.

The distinction we have in mind is made plain when the language of Sections 5 and 6 of the act of 1891 are examined and contrasted.

Section 5 gives a right of appeal from the Circuit Court to the Supreme Court in three classes of cases:

a. In a case which "involves the construction or ap-"plication of the Constitution of the United States."

b. "In which the constitutionality of any law of "the United States, or the validity or construction of any "treaty made under its authority is drawn in question."

c. "In which the Constitution or law of a state is "claimed to be in contravention of the Constitution of "the United States."

In the first of the three classes of cases the constitutional question must have been "involved." In the second it must have been "drawn in question." In the third it must have been "claimed." All three expressions mean the same thing, namely, that the question must have been distinctly presented for decision in the court below. In the language of the last of the three classes, it must have been "claimed."

The claim may be made in the complaint, the answer, the replication, during the introduction of testimony, by a request to charge the jury, or in innumerable other ways, but it is requisite that in some of these ways the claim should have been made distinctly and explicitly, so as to have been brought to the attention of the lower court and ruled on; otherwise, a case is not made in which the constitutional right is "claimed." Again, if facts are stated in a complaint which show that the law of a state is in contravention of the Constitution of the United States, but if the question is not stated in such a manner as to show that it was relied on as the gravamen of plaintiff's case, and if the case in fact goes off on other questions, the constitutional question not being presented and decided, then equally, we have a case in

which the constitutional question was not "claimed" within the meaning of Section 5 of the statute. But under Section 6 of the act, which gives appeals from the Circuit Court of Appeals to the Supreme Court, there is no room for such a criterion. Under that section the decisions of the Circuit Court of Appeals are made final in all cases where the jurisdiction of the Circuit Court depended *entirely* on diverse citizenship, and right of appeal is given in all other cases. Whether the jurisdiction of the Circuit Court depended entirely on diverse citizenship is a question dependent on the allegation of the complaint construed according to the ordinary rules of pleading. In pleading, the pleader does not "claim" anything except in his demand or prayer for relief. He simply sets out the facts of his case in due and logical form, and asks the relief to which he conceives himself entitled. If on the facts stated he is entitled to the application of the Constitution of the United States for his protection, the Court applies it, and that is all there is to it. In such a case his rights are founded upon the Constitution, and the case is one in which the jurisdiction is founded, in part at least, on the presence of a constitutional question. In such a case, moreover, it is not essential that the Court should have considered or passed on the constitutional question. If it necessarily arises from the allegation, that ground of jurisdiction is present, and no lapse of Court or counsel can remove it from the case.

This distinction, we conceive, answers the cases cited by appellee in his brief on the motion to dismiss. Two

only of those cases came from the Circuit Court of Appeals, and one of them only by appeal under Section 6. These cases we will notice last.

The cases appealed from the Circuit Court direct, under Section 5, quoted by appellant, all presented the simple question whether the right or immunity arising under the Constitution or laws of the United States, which it was insisted was in the case, had been claimed below, or if claimed, whether it was a real and substantial claim, and the holding in each case was against such contention.

Grace v. American Central Ins. Co., 109 U. S. 278.
Appeal from Circuit Court under Sec. 5.

In this case there was no contention that a Federal question was presented. The jurisdiction was planted wholly on diverse citizenship, and the decision of this Court was that such diversity was not shown.

Lampases v. Bell, 180 U. S. 276.

Appeal from Circuit Court under Sec. 5.

In this case it was insisted that the Federal question was shown on the face of the complaint, but nevertheless the question was, whether it was presented in such a way and was in fact such a question as would authorize an appeal under Section 5. The city of Lampases had attempted to set up on behalf of part of the territory comprising it that it had been illegally embraced

within the city limits, and that to hold persons within such territory liable for the debts of the city would be to deprive them of their property without due process of law, etc. It was held that the city had no interest in such a controversy, and could not litigate it, and hence that the case did not present a real and substantial claim within the meaning of Section 5.

No such holding can be made in the present case, because, if Hanley's complaint disclosed a deprivation of property without due process of law, as we have shown it did, then his interest in contesting it cannot be controverted.

York v. Texas, 137 U. S. 15.

Error to Supreme Court of Texas.

The pertinency of this case to any proposition here is not apparent. There was no question of the jurisdiction of a Circuit Court of the United States, and the gravamen of the case is, that a statute of Texas converting a special appearance to question the sufficiency of process into a general appearance upon which judgment might be rendered, was not in contravention of the Fourteenth Amendment.

The case is probably cited because of the remarks of Mr. Justice Brewer that if the law were unconstitutional the appellant had not yet been hurt. But the complainant in this case is doing what Mr. Justice Brewer said appellant might do in that case if his property was seized or threatened under an invalid judgment—he is asking the remedial and preventive pro-

cess of the Court to prevent the consummation of the unconstitutional act. The Probate Court of Idaho, as the result of its unconstitutional action, undertook to avoid complainant's deed, gave defendants a deed, put them in possession of the property, and according to the allegations of the complaint, they were holding it under the second deed, and proceeding to despoil it. In any event the action of the Idaho courts clouded the title of complainant, and thereby rendered it less valuable, and was a taking of property within the meaning of the Constitution.

In opposition to the inference sought to be drawn from this case we cite *Noble v. Union River Logging Railroad,* 147 U. S. 175, where the Court employed its preventive process against the head of a department of the Government to defeat unconstitutional action which would have had no other effect than to cloud complainant's title.

Cosmopolitan Company v. Walsh, 193 U. S. 460.

Error to the United States Circuit Court.

Here again was no question of the jurisdiction of the Court on the complaint, but simply whether there was a real and substantial controversy in the case over the effect or application of the Constitution.

The case illustrates the inutility of alleging constitutional provisions. The replication in the case alleged "That the plaintiff has been and is being deprived of his property, *viz.*, the property sought to be recovered

in this action, without notice, hearing, opportunity to be heard, or due process of law, and in violation of the Constitution of the United States," but because the Court could see that the controversy in fact was over the construction of the laws of Colorado, it was held that no real or substantial question of constitutional immunity was presented or claimed in the case. The difference between that case and the one now before the Court is that the complaint here sets out in due and logical form, as the gravamen of the case, a state of facts which shows a deprivation of property without due process of law. True, it does not mention the Fourteenth Amendment, but since a mention of the Constitution is insufficient without a statement of facts which shows its real application, it necessarily follows that a statement of facts which shows its real application, without mention of the Constitution, must be sufficient. Nowhere on the face of the complaint in this case is there a suggestion that the action of the Idaho courts is defensible or can be defended on some construction of the local law. The fact that the Court below attempted to so defend it cannot add to or take from the averments of the complaint which show jurisdiction. It might, however, be pertinent if the question here were whether the constitutional right was involved in the case or claimed, within the meaning of Section 5 of the act of 1891.

Cornell v. Green, 163 U. S. 75.

Appeal from the Circuit Court under Sec. 5.

This case well illustrates the distinction between appeals under Section 5 and Section 6 of the act of 1891

which we have attempted to draw. The appeal was under Section 5, and the Court states the principle which governed it in almost the first sentence, "No construc-"tion or application of the Constitution can be said to "have been involved in the judgment below when no "construction or application thereof was either expressed "or asked for." The fact that an immunity under the Constitution was claimed first appeared in the assignment of errors. The Court, being at liberty to scan the entire record, could see that the only question litigated below was one of statutory construction, and could properly give effect to Section 5, which limited appeals to cases where a question of constitutional right is involved or claimed.

Ansbro v. United States, 159 U. S. 695.

Appeal from the Circuit Court under Sec. 5.

This case merely holds that no question of constitutional right is involved or claimed in a case when the question is first raised in the assignment of errors, and manifestly it has no application to the question now before the Court.

Ex Parte Lennon, 150 U. S. 393.

Appeal from the Circuit Court under Sec. 5.

In this case it was held that the petition for the writ of *habeas corpus* did not present to the Court any constitutional question, and that none was passed on. This is simply another adjudication that in appeals under Section 5 the Court will scan the entire record to de-

termine whether a constitutional question was involved, raised or claimed in the court below, and that in default of such a question an appeal will not lie.

The petition in this case undoubtedly alleged in a very general way facts which showed lack of due process. But following the distinction which we have attempted to draw, it seems clear to us that although facts may be set up on the face of a complaint which show ground for the application of the Constitution, this Court would disregard them where the case is brought to it under Section 5, if, on looking through the entire record, as it may do on such appeals, it could see that the case was fought out in the Court below on another and a different theory, because in order to maintain the jurisdiction on appeal in such cases, it is necessary that the constitutional question was "involved," "drawn in question" or "claimed" in the Court below. But it seems equally clear that in such a case depending here on appeal under Section 6, the appeal ought to be sustained, because in such a case the inquiry is whether the jurisdiction of the Circuit Court was based in whole or in part on a real and substantial controversy which called for the construction or application of the Constitution. After alleging the proceedings in the Probate Court, the complaint in the case at bar then proceeds: "And your "orator alleges that the proceedings of said Probate "Court, of date August 13, 1897, were without jurisdic- "tion of either the subject matter or the parties in inter- "est; that after the close of the July term of said Court "it had no power or authority by law to set aside, at the "succeeding term of August, 1897, the judgment and de- "cree made at its former term, as was assumed to be done

"August 13, 1897, except by regular proceedings for "that purpose, to which the parties thereto were entitled "to notice, if it possessed any power in that behalf; and "all of the pretended proceedings of said date were ab- "solutely null and void, and the decree of said date is "null and the proceedings thereunder totally void."

Now why are these proceedings, at a subsequent term, without notice, alleged to be null and void? They might be null and void because of statutory provisions, but the bill does not so allege. But they were certainly null and void because they contravened the provisions of the Fourteenth Amendment to the Constitution of the United States. This any court could see, and, therefore, why should the allegation be referred to local law rather than to the Constitution of the United States?

If the complaint had alleged that the proceedings were null and void because in contravention of the Constitution, we apprehend that no one would question the Federal jurisdiction. But what reason is there for such an allegation? Cannot the Court draw a necessary inference as well as the pleader? Indeed, as stated by Mr. Justice Waite in *Gold Washing & Water Co. v. Keys, supra,* the Court is the one and the only one to draw the inference, and it would have been bad pleading for the pleader to attempt to do so.

Carey v. Houston Ry. Co., 150 U. S. 170.

Appeal from Circuit Court under Sec. 5.

The Federal question which was claimed to be in this case arose on the face of the complaint, but, for the reasons stated in commenting on the last case, it has no

application here. Moreover, it is impossible to make out by even the most liberal inference that the complaint set up facts showing a deprivation of property without due process of law. The complaint made a case of fraudulent and collusive judgment procured to be rendered by the representatives of the stockholders of the railway company for the purpose of defrauding the latter. That the stockholders were properly in court in the case in which judgment was rendered, through their representatives, was not questioned.

Western Union Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239.

Appeal from Circuit Court of Appeals under Sec. 6.

This case we admit was governed by the same provisions of law which govern our case, and if the principles laid down in it contravene our right of appeal, then we are out of court. The principle of the case is that the Federal question set up on the face of the complaint must be real and substantial, and not merely colorable. The only averment in the complaint which at all indicated a Federal question was the averment that the complainant had a right to maintain its telegraph lines on the railway of respondent, independent of contract, under the statutes of the United States. This was held to not present a real and substantial controversy, because, as said by the Court, "In view of the settled construc-"tion of the statute (to the contrary) we could not per-"mit such a contention to be recognized as the basis of "jurisdiction." The words in parenthesis are ours.

Moreover, the averment was a mere conclusion of law, and one which, as stated by the Court, was untenable. Measured by anything stated or established in this case, the jurisdiction of this Court to entertain our appeal is impregnable. The right of complainant to the application of the constitutional protection guaranteed him, if the facts stated by him were true, was unquestionable, and the facts stated by him were pleaded in due and logical form so as to necessarily draw to him the protection of the Constitution.

New Orleans v. Benjamin, 153 U. S. 423.

Certified from the U. S. Circuit Court of Appeals.

The question here was whether a Federal question appeared on the face of the complaint. The act of Louisiana repealing the law creating the Police Board made no provision for the payment of the indebtedness created by that state instrumentality. This fact was set up in the bill and it was alleged that the repealing act was in violation of Section 10, Article 1, of the Constitution; but the bill alleged further that the city of New Orleans had succeeded to the liabilities of the Police Board, and the prayer of the bill was, among other things, that the Court compel the city to satisfy such liabilities. This Court held that the case did not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution, because the bill was framed on the theory that the city of New Orleans succeeded to the debts of the Police Board, was liable for them to the same extent, and had the

same power in every respect to provide for their payment. Moreover, that this theory was sound, and hence that the pretense that the repealing act impaired the obligation of contracts, was merely colorable, and presented no real and substantial controversy. There is nothing, we submit, in this case which militates against the right of appeal in our case.

Counsel for appellee has quoted extensively from this and the preceding cases in his brief. We will not follow him in that course, because it is the inference to be drawn from the reason of cases that is valuable and controlling, and the language of judges, however broad and comprehensive, is always to be read and limited by the questions actually before them.

Before leaving this branch of the case we again call the attention of the Court to

Northern Pacific Railway Co. v. Soderberg, 188 U. S. 526, and
Warner v. Searle & Herath Co., 191 U. S. 195.

These cases came up from the Circuit Court of Appeals under Section 6 of the act of 1891. In each of them there was diverse citizenship, but it was held that there was in each of them, also, on the face of the complaint, a Federal question. But in neither of them were the provisions of the statute on which the Federal question hinged specifically referred to, and in the first of them, at least, it is apparent that the pleader had no intention of raising a Federal question in the complaint. The theory of the complaint in that case was that title

was indisputably in the Northern Pacific Railway Company, and the averment that the land in controversy was valuable only for the granite in it, which the defendant was proceeding to waste, was for the purpose of invoking the preventive power of the Court. The proposition that granite was a mineral and that the land for that reason did not pass to the railway company was the contention of the defendant. Yet since the complaint showed that the land was valuable only for its granite, this Court held that it presented the question whether granite was a mineral, and whether the land passed to the railway company. The rationale of the case is that the intention of the pleader is immaterial. If the complaint in fact shows a Federal question, that is sufficient, and the case may be appealed to this Court under Section 6.

We now pass to another question. The allegations of the complaint to which we have heretofore called attention relate to an eight twenty-fourths (8-24) interest in the Skookum mine, which complainant claimed to have acquired at administrator's sale. He also sued to recover another separate and distinct interest in the mine, to-wit, a one-eighth (1/8) interest, which he claimed to have owned, and which he alleged the defendants had acquired from him by fraud and deceit, and the rifling of an escrow depository. The courts below declined to give him any relief as to the eight twenty-

fourths (8-24) interest, but set aside in his favor the sale of the one-eighth (⅛) interest, and it is this latter action of which the defendants are now complaining. Since we prevailed as to the eight twenty-fourths (8-24) interest, concerning which the complaint presented the constitutional question, appellee insists that the recent case of *Anglo-American Provision Company v. Davis Provision Company et al.*, 191 U. S. 376, is an authority against our right of appeal.

But we again remind the Court of the difference between the language of Sections 5 and 6 of the act of 1891. The Anglo-American Provision Company case was appealed directly to the Supreme Court from the Circuit Court, under Section 5 of the act of 1891.

Under that section there is room to interpolate the proviso that one who has succeeded in the court below on the constitutional question presented may not use the presence of that question in the case as ground for appeal. Such has been the holding from the very beginning in appeals from the state courts, and it is easy to apply the principle to appeals from the Circuit Courts under Section 5.

But under Section 6 a right of appeal is given from the Circuit Court of Appeal in *all* cases other than the one specified class.

The right of appeal under Section 6 is made to depend on the rank or dignity of the case. If jurisdiction of the Circuit Court depended entirely on diverse citizenship the decision of this Court on appeal is final. If any other element of jurisdiction is present it is not final. How is it possible to write into that section any qualifica-

tion concerning the prevailing party or how jurisdictional questions may have been decided? The sole criterion of appeal under Section 6 is, was the jurisdiction of the Circuit Court dependent entirely on diverse citizenship? If not, the statute says the case may be appealed. The language of the act is:

"There *shall be of right* an appeal * * * where "the matter in controversy shall exceed one thousand "dollars besides costs."

That the limitation on appeals applied by this Court to Section 5 cannot be applied to appeals under Section 6 is made apparent by another consideration. Jurisdictional averments frequently have no relation to the merits of the case. A suitor comes into a Federal court or is brought into a Federal court by reason of his status as an officer of the Government, or, if a corporation, by reason of having derived its corporate existence at the hands of the Federal Government. It has been held that a right of appeal in such cases lies in favor of either party from the Circuit Court of Appeals to the Supreme Court.

Howard v. U. S., 184 U. S. 138.
Union Pacific R. R. v. Harris, 155 U. S. 326.
Sonnenthal v. Christian Moerlin Brewing Co., 172 U. S. 401.
Northern Pacific Railroad v. Amato, 144 U. S. 458.

Now it is manifest that the right of the parties to appeal cannot be gauged by the decision of the lower court on the jurisdictional fact set up. Suppose the defendant, in a suit by such a suitor, denies the jurisdictional fact, as that the plaintiff was in fact a marshal

of the United States or a clerk, or, if a corporation, that the corporation was chartered by Congress, and that issue is found for the plaintiff, but the defendant prevails on the merits, is the right of the plaintiff to appeal cut off? It would not, we apprehend, be so held. In fact, the right to appeal to this Court from the Circuit Court of Appeals has been maintained in this class of cases without reference to the decision on the jurisdictional questions. The statute, we submit, cannot be given two different interpretations. If the decision of the lower court on the jurisdictional questions be immaterial in one case it must be immaterial in all cases.

But we do not admit that this appellant prevailed below on the branch of the case involving the constitutional question and lost on the other. The constitutional question pervaded the entire case and governed the jurisdiction as to each branch of it. The transactions set up in the complaint were so connected that if there had been no allegations of diverse citizenship, the constitutional question raised with reference to one of them would have held the other and given the Court power to adjudicate with reference to it.

It is familiar law in the practice of courts of equity that good ground of equity with reference to one part of a connected transaction gives the court power to adjudicate with reference to the entire case.

Pomeroy's Equity Jurisprudence (2d Ed.), Vol. I, Sections 181 and 231 to 242.

There is no reason why this principle should not apply as well to the constitutional and statutory jurisdiction of the Federal courts as to their equitable jurisdiction. It has been so applied on the Circuit.

Brooks v. Stolley, 3 McLean, 523, per McLean, J.

It has also been applied by this Court, in principle, in the series of cases where bills which were original in the equitable sense, and therefore required diversity of citizenship for purposes of Federal jurisdiction, have been treated as ancillary and supplemental for the purpose of avoiding objection to the Federal jurisdiction.

Blossom v. R. R. Co., 1 Wallace, 655.
Minnesota Co. v. St. Paul Co., 2 Wallace, 609.
Freeman v. Howe, 24 Howard, 460.
Johnson v. Christian, 125 U. S. 642.
Pacific Railroad of Mo. v. Missouri Pacific Railroad, 111 U. S. 505.
Keppendorf v. Hyde, 110 U. S. 276.

The whole case, then, may be said to have been governed by the constitutional question.

And this view is enforced by the fact that there would have been no equity in the complaint as to the one-eighth interest if the allegations of the complaint as to that interest had stood alone. The complaint alleged fraud and deceit in the procurement of the making of the deed to the eighth interest, but it also alleged that the deed had then been placed in escrow and afterwards abstracted from the escrow depository by defend-

ants without complying with the escrow agreement. The averment of fraud and deceit in the making of the deed was mere *brutum fulmen*, and nothing can be predicated on it. The ground was cut out from under it by the averment, found as a fact by the lower court, that the deed had never been delivered.

A deed or other instrument deposited as an escrow is nothing but a mere scroll, and the grantee in the deed acquires no title by gaining possession of it by theft or fraud.

Calhoun Co. v. American Emigrant Co., 139 U. S. 127.

And where possession is so obtained the grantee can convey nothing even to an innocent purchaser for value.

American and English Encyclopoedia of Law, Second Ed., Vol. II, page 350, note 3.

Upon the facts alleged as to said eighth interest, therefore, there was nothing requiring the interposition of a court of equity, and the complainant, being out of possession, had a plain, speedy and adequate remedy at law.

The complainant, then, has had the advantage from the beginning, of the case made by him in the complaint concerning the eight twenty-fourths interest. He stalled off with it a demurrer which would have put him out of court. He still has an advantage from it, because if our appeal be maintained, he can take a cross-appeal and still present that feature of the case to this Court, or if our appeal be dismissed he can then take an independent appeal. His right to appeal dates from

the same time as ours, namely, February 6, 1905, when the final judgment in the case was rendered.

Can the complainant be heard to say that the eight twenty-fourths interest is not in the case, for the purpose of dismissing our appeal, when it has been in the case to his advantage all along, and is still in the case for an entire year to permit to him an independent appeal? What is there to prevent him from appealing the case to the Supreme Court on the adjudication concerning that interest after this appeal is dismissed? And if he awaits until the last day of the year to take his appeal, where would we be with our cross-appeal if, having been once dismissed out of Court, we would still have a right of cross-appeal?

We submit to the Court that it does not lie in the mouth of the appellee to say that the eight twenty-fourths interest is not still in the case. Moreover, that these considerations show the inapplicability to an appeal, under Section 6, of the principle laid down to govern appeals under Section 5, by the case of *Anglo-American Provision Co. v. Davis Provision Co, supra.* The case should rather be governed by *Loeb v. Columbia Township Trustees,* 179 U. S. 478, where it was pertinently asked, "Can the case, so far as the township is "concerned, be considered as belonging to the class "which the act of Congress brings directly within the "cognizance of this Court, and yet not be regarded as "a case of that class with respect to the plaintiff?"

But over and above everything else, we deny that the constitutional question was adjudicated against complainant and in favor of appellant.

The decision of the Circuit Court of Appeals was, not that complainant had had due process of law in the Idaho courts, but that he had been guilty of such fraud in acquiring the eight twenty-fourths (8-24) interest, anterior to the action of the Idaho courts, that the Federal courts could not, in accordance with the rules of equity, give him any relief. Undoubtedly the complainant can prosecute an appeal to the Supreme Court if he cares to do so, on account of the failure to give him the relief sought with reference to the eight twenty-fourths (8-24) interest, although on the constitutional question raised by the complaint, the decision may be said to have been as much with him as against him. If complainant, prevailing on one branch of the case and losing the other (the constitutional question being avoided), can prosecute an appeal, it is difficult to see why the appellant, being in identically the same situation, cannot do the same thing.

The appeal here is the joint appeal of the Empire State-Idaho Mining and Developing Company and the American Bonding Company of Baltimore, the judgment below having been a joint judgment against both companies. How the Bonding Company was brought into the case is disclosed by the record, in case 1083, pp. 173-175, and the special appearance of that company to object to any judgment against it, and the nature of those objections, is shown at pp. 178 and 179 of the same record. The pages here referred to are the pages

of the record in the Circuit Court of Appeals, the record on appeal to this Court at the time of preparing this brief not yet having been prepared, much less printed. The Bonding Company had the right to litigate the question of its liability and the sufficiency of the process to bring it into court, and having been defeated in that litigation, had the right to appeal to this Court, because the jurisdiction of the Circuit Court as to it did not depend entirely, or at all, on diverse citizenship. The right to proceed against it arose from the fact that it had performed an act with reference to a case depending in the Federal Court, which, under the statutes of the United States and the law and practice of the Court, made it liable at the suit of the complainant. That act was the giving of a supersedeas bond in the equitable action brought by the complainant. The Federal statute assimilating procedure in the Federal courts to state procedure, has no application to an equitable action, and hence there is no known method of taking a summary judgment on such a bond, as is done on appeal bonds in legal actions under the influence of state statutes. If it is desired to proceed on such a bond there are only two recognized methods of doing so. One is by formal action on the bond and the other is by *scire facias* in the court where the bond was given. The proceeding by *scire facias* is not auxiliary or supplemental to the case in which the bond was given, but is an original action, only it must be brought in the court to which the record belongs.

Daniels, Chy. Practice (5th Ed.), Vol. II, page 1758.

Winder v. Campbell, 14 Howard, 443.

The course pursued here against the Bonding Company, if sufficient at all, must have had all the requisites of *scire facias,* which was an original action in the Federal Court, not dependent on the principal case, and having its jurisdiction founded on the Federal nature of the transaction. The case is here at the instance of both of the joint obligors in the judgment, and the jurisdiction as to one of them was not based on diverse citizenship. The motion to dismiss, then, cannot prevail as to either party because, the judgment being joint, both must join in the appeal.

It is true, as stated in the brief of appellee, that this case has been here before on petition for the writ of certiorari, and we ask the Court to recur to that petition and the brief supporting it, and to the record accompanying it, for an insight into the questions presented. It will be found by so doing that those questions are many of them novel and difficult, and such as ought to be settled by the court of last resort, and that great wrong and injury has been inflicted by their erroneous decision in the Court below. And in view of that fact, we pray the Court, if it shall be of the opinion that it is without jurisdiction to maintain this case here on appeal, to retain it as by certiorari, in accordance with the precedent set in the case of *Security Trust Co. v. Dent,* reported in the 187th U. S. Reports, at page 237.

The following, among other questions, are in the case:

First—Through an unfortunate misconstruction of the effect of certain testimony by the Circuit Court of Appeals, and against the clear preponderance of the testimony, the deed from Hanley to Clark and Sweeny for the one-eighth interest in the Skookum mine was set aside on the ground of fraud, although the trial Court, with the parties and witnesses before it, and familiar with the local atmosphere of the case, had found that there was no fraud and dismissed the complaint.

Second—The bill of complaint, although it set up nothing with reference to the eighth interest except the alleged fraud in procuring the deed, and prayed for nothing in legal effect except cancellation and restoration, was held to be a bill to quit title both to the eighth interest in the mine and to all ore bodies within its vertical limits, and the decision in the case on the merits was held to conclude defendants on both questions and to prevent them from showing on the accounting that the ore mined from the Skookum mine did not in fact belong to it, but belonged to another mine, the exclusive property of defendants, because the vein apexed in the latter mine.

Third—This decision was made in a mandamus suit brought against the Circuit Judge, to which suit the defendants were not parties, and when the case again reached the Circuit Court of Appeals the decision in the mandamus case was held to be the law of the principal case, and to prevent any further consideration of the nature of the suit.

Fourth—Although defendants were the undisputed owners of seven-eighths of the Skookum mine, they

were held to be wilful trespassers in mining ore from it, and were held to the rule of damages laid down by this Court in the Woodenware cases, to-wit, that of wilful trespassers, and were held liable on the accounting for the gross value of the ore mined by them, without deduction for mining, hoisting, milling and other expenses of turning the ore into money.

Thus they were, by a fiction, not only made to pay complainant for their own ore, but by the same fiction were made to pay him more than twice what it was worth, and this without having been heard on the questions which were held to have established the fiction against them. As a result of this course of decision the defendants find themselves with a money judgment against them of more than three hundred thousand dollars (principal and interest), and with one hundred and fifty thousand dollars more sequestered under an order of the Court, and held to await the final judgment in this case.

If the Court shall deem us unduly persistent in again urging our prayer for certiorari, the former petition having been denied, we submit that the results reached in the case are so grievous and so inequitable as to justify us in pressing upon the Court, within the limit of its rules and to the full extent of its patience, the justice and propriety of securing, in some way, a review in this Court of the rulings of the Court below.

Respectfully submitted.

F. T. POST.
W. B. HEYBURN.
GEORGE TURNER.
Solicitors for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1904.

EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY, AND AMERICAN BONDING COMPANY, OF BALTIMORE,
APPELLANTS,

vs.

KENNEDY J. HANLEY,
APPELLEE.

No. 604.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

On Motion of Appellee to Dismiss the Appeal, Accompanied by Printed "Extracts from Transcript of Record."

Come now the appellants in the above entitled cause, and suggest that the printed "extracts from the transcript of record" are not sufficient to fully inform the Court of the issue, and to warrant the submission and consideration, at this time, of the motion to dismiss the appeal herein.

Statement.

The appellee has filed a substantial, but not full, transcript of the record in the Circuit Court of Appeals for the Ninth Circuit, complete perhaps, with the exception of citation and service, before the return day upon which appellants should file the record, of which he has printed certain extracts, to wit:

The bill of complaint, answer, replication, decree, opinion of Circuit Judges, decrees and opinions of Circuit Court and Court of Appeals; order of Circuit Court of Appeals denying appeal to Supreme Court, petition for appeal, and allowance by Supreme Court Justice; bond on appeal; and thereupon moves to dismiss the appeal because no federal question appears.

This he may do, provided so much of the record has been printed as may be necessary to make the motion intelligible; but if the Court is required to look into the unprinted record it will postpone the motion until the hearing on the merits.

Deficiency of Printed Extracts.

The printed extracts are deficient in at least two material particulars:

1. The Appellee contends (p. 8, brief) that "the claims of complainants with respect to the two interests were based upon distinct and independent grounds."

(Citing 109 Fed. Rep., p. 713.)

The Appellants' contention is that all the transactions set up in the complaint were so connected in fact that the questions raised with reference to one would have held the other (pp. 25, 26, 27, Appellants' brief) and authorized adjudication of the whole controversy.

True, the decision in 100 Fed. Rep., cited by appellee

and just above quoted is that the transactions were entirely distinct, two separate instead of one more or less joint, but that is the issue upon the appeal and depends not upon the allegation, but the proof, upon the whole record bearing thereupon, not printed, but to which the Court must refer in order to "act understandingly."

Only so much of the proofs has been printed as is recited in the opinions of the Courts.

2. How the American Bonding Company, of Baltimore, a corporation, was brought into the case, how it tried to get out, or rather to insist that it had not legally been brought into the case and the jurisdiction of the Court, so that a judgment against it would not be a deprivation of property without due process of law is shown in the printed extracts *only* as recited in the opinion of the Court of Appeals. This question is discussed at pages 129-31 appellant's brief herein, and it is apparent that the Court must look into the unprinted transcript to find the facts upon which to base its decision.

THE RULE GOVERNING PRINTING OF RECORDS ON MOTION TO DISMISS

will be found in the following decisions of this Court:

Ex parte Russell, 13 Wall. 671 (Dec. Term, 1871).
Thomas & Co. *v.* Wooldridge, 23 Wall. 288 (October Term, 1874).
Clark *v.* Hancock, 94 U. S. 493 (October Term, 1876).
(In these cases the record had been printed.)

National Bank *v.* Insurance Company, 100 U. S. 43 (October Term, 1879).

In this case the Court, Mr. Chief Justice Waite delivering the opinion, said:

"The further consideration of this motion is postponed until the case is heard on its merits. The record has not

been printed, and counsel do not agree as to what it contains. We will not decide motions to dismiss before the record is printed, when there is any question about the facts on which the motion rests. In order to get a decision before printing, the motion papers must present the case in a way which will enable us to act understandingly without referring to the transcript on file."

Crane Iron Company *v.* Hoagland, 108 U. S. 5 (October Term, 1882).

Mr. Chief Justice Waite delivered the opinion of the Court and said:

"The motions to dismiss are made because, as is claimed, no Federal question is involved. The records have not been printed, and on these motions we can look only to the statements of counsel as they appear in the briefs. The assignment of errors has been printed in the brief for the defendants, and the second and fifth assignments clearly present questions of which we have jurisdiction. Whether the errors thus assigned appear in the records we cannot on these motions, as they are now presented, finally determine, but in the absence of any showing to the contrary, we will presume they do. The motion to dismiss must, therefore, be overruled."

Waterville *v.* Van Dyke, 115 U. S. 290 (October Term, 1885).

In this case, Mr. Chief Justice Waite, delivering the opinion of the Court, said:

"The record has not been printed, and in *National Bank* v. *Insurauce Co.*, 100 U. S. 43, we announced the rule that to get a decision on a motion to dismiss before printing, the motion papers must present the case in a way which will enable us to act understandingly without referring to the transcript on file. * * *

There is nothing on which we can act unless we go to the transcript.

The further consideration of the motion is consequently postponed until the case is for hearing on its merits."

Texas Land and Cattle Company *v.* Scott, 137 U. S. 436 (October Term, 1890).

Per curiam. Syllabus.

"Motion papers should contain in themselves so much of the record as to enable the Court to act understandingly but when they are deficient in that respect the Court may, if it please, examine the record."

In Carey *v.* Houston & Texas Central Railway, 150 U. S. 179 (October Term, 1893).

Mr. Chief Justice Fuller, delivering the opinion of the Court, said:

"On motion to dismiss or affirm it is only necessary to print so much of the record as will enable the Court to act understandingly without reference to the transcript.

Walston *v.* Nevin, 128 U. S. 578 (October Term)."

And in that case, the original and amended bills, the answers and replications, the opinion of the Circuit judge, the final decree, the two appeals and proceedings therein, and the assignment of errors in both courts, were held sufficient for the purpose of the motion; but inspection of that case will show that the issue clearly appears on the face of the printed abstracts, and no specific deficiency of record was pointed out, as was held to be necessary in *Walston* v. *Nevin*, quoted.

While it has been held (Walston *v.* Nevin, *supra*) that the Court would only require the printing of so much of the record as would enable it to act understandingly without referring to the transcript, accompanied by the intima-

tion that opposing counsel should specifically point out the deficiency, yet, a Federal question being raised, "*a motion to dismiss would not be sustained.*"

In the case at bar, it is submitted that the Court cannot "act understandingly without referring to the transcript," on both propositions referred to.

It appearing that the Court must "refer to the transcript" in order to ascertain whether the appellant's or appellee's brief correctly states or understands the issues, there being a disagreement, we are remitted to the rule as laid down in Mayer *et al. v.* Walsh, 108 U. S. 17 (October Term, 1882), that—

"In the absence of a printed record the Court will not grant a motion to dismiss when the motion papers disclose equitable reasons why it should not be granted; and the further consideration is postponed until the hearing on the merits."

Whether the action of the Court in taking summary judgment against the American Bonding Company of Baltimore, one of the appellants, but not otherwise nor theretofore a party to the record, under the circumstances disclosed in the transcript, but not fully shown in the printed extract (except in the recitals of the opinions of the lower courts), might be sustained or reversed in this Court cannot be determined or considered on the motion to dismiss, particularly upon the printed extract, unless as an equitable reason appearing on the face of the motion papers why the motion *must* be postponed to the hearing on the merits. The appeal will not be dismissed (on motion) merely because the claim by which the Federal question is presented is not well founded.

If the claim or question is presented in the transcript the motion must be denied or postponed.

See Taylor's Juris. and Pro. Sup. Ct., p. 626.

Citing—

Blythe *v.* Hinckley, 180 U. S. 333.

Should appellee be aggrieved by the necessary delay incident to a hearing upon the merits, he could print all the record, or move to advance the case.

Where the question of jurisdiction cannot be determined without looking into the merits, the motion to dismiss for want of jurisdiction will be denied, with permission to argue it upon the hearing. *On motion merely to dismiss the merits of the case cannot be considered.*

Taylor's Juris. and Pro. Sup. Ct., p. 637.

Citing—

Hecker *v.* Fowler, 1 Black, 95.
Semple *v.* Hagar, 4 Wall. 431.
Lynch *v.* De Bernall, 131 U. S. 94.
Bohanan *v.* Nebraska, 118 U. S. 231.
Hill *v.* Chicago and E. R. Co., 129 U. S. 170.

The quotation from the opinion of the lower court (109 Fed. p. 713), at p. 8 appellee's brief, peculiarly lacks force when considered in connection with the volume of the transcript now printed, because the correctness of the conclusions and the necessity of referring to the transcript for a determination by this Court of their correctness is one of the material issues involved in the suggestion of a deficiency in the printed extract.

MERITS.

One word as to the merits, in consequence of appellee's reply brief filed on the moment of submission. Nothing can be clearer than that appellants only want a full and free discussion and decision upon the merits and the law

applicable to the whole case. Manifestly either is impossible at this date in the present term.

Appellee asks the court not to allow an oral argument of the motion to dismiss (p. 2, reply brief), which request may be termed unnecessary, in view of the contrary practice, to say the least; tells of the expense of filing the record in advance of the appellants' filing; adverts to the fraud upon himself found by the lower court (p. 3, reply brief), while discreetly silent as to the frauds he committed and which the Court of Appeals held were sufficient "to deprive him of the assistance of a court of equity" (pp. 10–11, appellee's original brief).

While appellants chafe under the decision against them, and seek to have it corrected, appellee endeavors to make the legal point, in lieu of moral credit, that upon the first hint of his own frauds he "abandoned his fight, and has never made any claim to it since." (Pp. 18–19, appellee's original brief.)

It would seem as if appellee were estopped from characterizing appellant's acts as "the grossest conceivable fraud" (at p. 3, reply brief), for the purpose of hastening the decision upon the motion and forestalling a hearing upon the merits.

The Court is told (at p. 7, appellee's reply brief), that a *certiorari* should not be granted. Just why this statement should be made at this time is not clear. If possessing argumentative force, upon the hearing of the motion, seemingly it would furnish an additional reason for looking kindly upon, anyhow looking into, the appeal, because appellant's "last chance."

Appellee (at p. 2, of his reply brief) goes rather outside the record to present himself as a poor man, and in the same sentence to ask special providences on that account, forgetful of Sec. 712, R. S., but, whatever be his condition, and he has pretty actively upheld his end of the litigation

all the while, since opportunity knocked at his door, it might be answered that he will take a very short cut to riches if able to stave off a decision upon the merits herein.

Appellants have nearly $400,000 in cash tied up and impounded, besides expense of supersedeas bonds, while appellee is amply protected against loss, with interest and damages added.

In the matter of hardship, only that lacks weight upon a motion, the burden bears more heavily upon appellant than appellee.

It is further said (at p. 3, appellee's reply brief) that the complaint states two causes of action, meaning that the suit is not an entirety but separable. That is a material issue in the case, but cannot be ascertained without looking into the unprinted transcript and passing upon the merits.

Appellants contend that the escrow agreement was one transaction, appellees that it was another, and it is one or two causes of action accordingly as one or other set of witnesses is believed (referred to at pp. 33 and 53–4, printed extract).

These points are referred to herein because advanced in appellee's reply brief in support of his appeal for an immediate decision of the motion and to choke off full argument ——— by his adversaries.

Conclusion.

1. The Court may, of course, if disposed, take the time and trouble to search through the unprinted transcript for the issues involved and not fully appearing in the printed extracts. In one case (Texas Land & Cattle Co. *v.* Scott, *supra*), the Court has held that it could examine the record; but it is not known that the Court ever has exercised this power or looked beyond the motion papers. No reason has been shown for making this case an excep-

tion. That is a matter wholly within the Court's discretion, and not subject to argument.

2. That the Court will find time for anything like a sufficiently thorough scrutiny of the whole record (seven printed volumes, as stated at p. 3, appellee's original motion and brief) is doubtful.

3. That any argument of the unprinted case, or the merits, can be attempted at this time is impossible even if allowable, although appellee has gone far outside his "printed extracts," as see—

P. 22 of his original brief.

Pp. 2 and 7, reply brief.

It is respectfully submitted that the only open question upon this motion is whether the Court will consider the motion papers strictly, or look into the unprinted record at the term end, in a case where the movant is amply protected against damage (which even he does not question) and that may be brought on to a hearing upon the whole record, including the merits and motion, at the first day upon which the Court will be in session for arguments with appellee's consent and the Court's permission. Only the appellants can be harmed by a too hasty decision; delay cannot advantage them a penny.

Respectfully submitted.

F. T. POST,
W. B. HEYBURN,
GEORGE TURNER,
Solicitors for Appellants.